

MAR 17 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

FRANCISCO MORENO-SUAREZ,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-74179/04-74181

Agency Nos. A79-526-167
A79-526-168

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted March 8, 2006**

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges.

Francisco Moreno-Suarez and Maria Leonila Alvarado-Flores, husband and wife natives and citizens of Mexico, petition for review of the Board of Immigration Appeals' ("Board") denial of their motion to reopen or reconsider the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Board's earlier summary affirmance of an immigration judge's denial of their applications for cancellation of removal. We grant in part and deny in part the petitions for review.

As an initial matter, the government contends that we lack jurisdiction over these petitions for review, pursuant to 8 U.S.C. § 1252(a)(2)(B)(i), because they involve a decision regarding the denial of discretionary relief under 8 U.S.C. § 1229b(b)(1)(D). We recently held that we have jurisdiction over such motions denied on procedural grounds. *See Fernandez v. Gonzales*, No. 02-72733, 2006 WL 488662, *6 (9th Cir. Mar. 2, 2006).

The Board did not abuse its discretion in denying petitioners' motion to reopen based on its determination that petitioners failed to present new or material evidence warranting reopening. *See* 8 C.F.R. § 1003.2(c)(1).

However, we conclude that the Board acted arbitrarily in denying petitioners' motion to reconsider based solely on a reference to 8 C.F.R. § 1003.2(b)(2) because petitioners did not challenge the Board's use of the streamlining procedure. *See* 8 C.F.R. § 1003.2(b)(2) (barring motions to reconsider that challenge only the Board's use of the streamlining procedure); *Bhasin v. Gonzales*, 423 F.3d 977, 983-984, 987 (9th Cir. 2005) (stating that this court will reverse the Board's denial of a motion that is arbitrary, irrational or

contrary to law and fails to show proper consideration of all the factors). We remand for further consideration of petitioners' motion to reconsider

PETITION FOR REVIEW in 04-74179 GRANTED in part and DENIED in part.

PETITION FOR REVIEW in 04-74181 GRANTED in part and DENIED in part.